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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 HIMC CORPORATION, a Washington
11 corporation,

12 Plaintiff,

13 v.

14 PREM RAMCHANDANI and Jane Doe
15 Ramchandani; SHAI BAR LAVI and ANNA
16 SACHS BAR-LAVI; AVI SIVAN and Jane
Doe Sivan; AVRAHAM OVAIDIA and Jane
Doe Ovaidia; and FIDELITY TRANSFER
CO., a Nevada corporation,

17 Defendants.

Case No. C07-5342FDB

ORDER DENYING MOTION TO
STAY PENDING ARBITRATION

18 On August 3, 2007, this Court issued a preliminary injunction restraining Defendant Fidelity
19 Transfer Co. from issuing new stock certificates to replace or substitute for certificates issued to the
20 individual defendants or from taking any other action that would remove or negate restrictive legends
21 placed on the stock certificates; the individual defendants were also restrained from taking any action
22 to cause the removal of any restrictive stock legends on certain shares of HIMC Corp. stock or from
23 taking any action to compel Fidelity Transfer Co. To issue new certificates to them without
24 restrictive legends.
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1 Defendants move for a stay pending arbitration, citing a provision in an “Operating
2 Agreement” between HIMC and the individual defendants’ company known as “Veripay,” which
3 Defendants contend was formed to market HIMC’s card processing services to companies in the
4 direct response marketing industry. Defendants argue (1) that HIMC’s claims (failure to pay for
5 certain shares of stock issued to the Defendants and that such failure to perform is a material breach
6 of the Memorandum of Understanding between the parties) constitute a contractual dispute; and (2)
7 Defendants’ counterclaims assert entitlement to the HIMC stock that has been issued and demand
8 that further stock be issued to them, plus, they seek damages from HIMC’s failure to remove the
9 restrictions on the stock. Thus, argue Defendants their claims also arise out of or in connection with
10 the Operating Agreement between HIMC and Veripay and these claims should be arbitrated even
11 though the Veripay Defendants are not signatories to the Operating Agreement.


12 Plaintiff opposes such a stay. HIMC argues that its claims for rescission are directed only at
13 the four individual defendants based only on the February 9, 2005 Memorandum of Understanding.
14 Also, both counterclaims make averments based on or arising out of the February 9, 2005
15 Memorandum of Understanding. Plaintiff notes that none of the claims relate to or arise from the
16 Operating Agreement, which Defendants cite as the source of their claim for arbitration. Moreover,
17 the Memorandum of Understanding does not contain any agreement to arbitrate any dispute related
18 to that separate contract which relates to the issuance of securities. Additionally, Fidelity Transfer
19 Co., the party directly restrained by this Court’s Preliminary Injunction, is not a defendant on any of
20 the counterclaims asserted by Defendants; nor is it a party to the Memorandum of Understanding or
21 the Operating Agreement.

22 The Ninth Circuit has discussed how a request to arbitrate is analyzed: “When we are asked
23 to compel arbitration of a dispute, our threshold inquiry is whether the parties agreed to arbitrate.”
24 *Townhouses v. Mar Industries Corp.*, 862 F.2d 754, 756-57 (9th Cir. 1988). Furthermore, the
25 arbitration agreement must apply to the particular dispute. *Id.*

1 Having considered Defendants' Motion, Plaintiff's Response, and Defendants' Reply
2 Declaration of Richard M. Mortner, as well as the record in this case, the Court concludes that the
3 motion for stay pending arbitration must be denied. In this case, the securities law issues raised in
4 the Complaint do not involve an interpretation of the Operating Agreement, nor do they arise under
5 it. Neither do the counter-claims concern the Operating Agreement. Moreover, Fidelity Transfer is
6 an essential and necessary party under Fed. R. Civ. P. 19, and it has not agreed to arbitration. This
7 motion is also late in the progress of this case, giving rise to a conclusion that Defendants have acted
8 inconsistent with any right to arbitration and with prejudice to HIMC from these inconsistent acts in
9 that HIMC's ability to depose Defendants may be suspended and the authority of an arbitrator to
10 interpret a Rule 144 securities restriction is questionable.

11 NOW, THEREFORE, IT IS ORDERED: Defendants' Motion to Stay Pending Arbitration
12 [Dkt. # 51] is DENIED.

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14 DATED this 25th day of July, 2008.

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17 FRANKLIN D. BURGESS
18 UNITED STATES DISTRICT JUDGE
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